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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM T. ELLIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the admission at trial of the prejudicial hearsay statements of an accomplice given to investigators pursuant to a plea agreement violated the Confrontation Clause of the Sixth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

William T. Ellis hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 951 F.2d 580 (4th Cir. 1991). The United States District Court for the Southern District of West Virginia's memorandum opinion and order, denying petitioner's motion for a new trial (App. *infra*, 11a-20a) is not reported.

JURISDICTION

The opinion of the court of appeals was entered on December 12, 1991. On March 3, 1992, the Chief Justice granted an extension of time to and including April 10, 1992, within which to file a petition for a writ of cer-

tiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

U.S. Const. amend. VI.

STATEMENT

Petitioner was indicted under a superseding indictment in the United States District Court for the Southern District of West Virginia on one count of conspiracy to commit and cause extortion in violation of 18 U.S.C. § 1951, three counts of aiding, abetting and causing West Virginia State Senators Larry A. Tucker and Daniel R. Tonkovich and West Virginia Governor Arch A. Moore to commit extortion, in violation of 18 U.S.C. §§ 1951 and 1952, one count of mail fraud in violation of 18 U.S.C. § 1341, two counts of engaging or conspiring to engage in racketeering activity in violation of 18 U.S.C. § 1962(c) and (d), and one count of obstructing justice in violation of 18 U.S.C. § 1503. Following a jury trial, petitioner was acquitted on the mail fraud charge and the charge of aiding, abetting and causing Governor Moore to commit extortion, but was convicted on the remaining six counts and sentenced to 90-months' imprisonment and fined $50,000. See C.A. App. 99-121, 2359-362, 2623;[1] App., *infra*, 3a.[2]

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[1] All materials that were submitted in the joint appendix to the United States Court of Appeals for the Fourth Circuit are cited herein as "C.A. App.".

[2] The court of appeals' opinion erroneously states that petitioner was sentenced to 107 months, App., *infra*, 3a; petitioner was sentenced to 90 months. C.A. App. 2623.

1. In essence the superseding indictment charged that during the 1987 Regular Session of the West Virginia legislature, petitioner approached Sam D'Annunzio, a lobbyist, and informed D'Annunzio that petitioner had $20,000 available which petitioner wanted D'Annunzio to use to assist passage of a bill then pending before the state legislature. C.A. App. 102. The bill would increase the percentage of wagered money that dog-racing tracks could retain. Petitioner at the time had a 20-percent interest in Tri-State Greyhound Park, a corporation owning such a track. App., *infra*, 2a. The indictment further charged that D'Annunzio then met with Senators Tucker and Tonkovich and offered each of them $10,000 in exchange for supporting the bill. Tonkovich was allegedly offered computer equipment as well. The superseding indictment alleged that Tucker received the proffered money, but subsequently returned it to D'Annunzio, who returned it to petitioner. Tonkovich never received money or computer equipment. C.A. App. 102-04. The superseding indictment also alleged that petitioner and D'Annunzio met and discussed bribing Governor Moore, and that D'Annunzio met with the Governor and offered him a campaign contribution of $100,000. C.A. App. 104-05.

Prior to issuance of the superseding indictment, D'Annunzio entered into a plea agreement with the federal government that required D'Annunzio to plead guilty to a tax felony and cooperate with federal investigators. According to the trial testimony of IRS special agent Little, D'Annunzio met with Little on numerous occasions in 1988. On two occasions in January 1988, D'Annunzio, in the presence of his two attorneys and pursuant to the plea agreement, met with Agent Little and a second agent to discuss his actions with respect to Tucker, Tonkovich, Moore and petitioner. D'Annunzio was not under oath at these meetings. No recording, transcription or signed statement was made at these meetings. Instead, the special agents took handwritten notes during the meetings and thereafter Agent Little

produced type-written memoranda recording impressions of what D'Annunzio had stated. Subsequently, D'Annunzio agreed to wear a wire and meet with Senator Tucker to discuss returning money Tucker had received. D'Annunzio also agreed to wear a wire to a meeting with petitioner at which D'Annunzio gave petitioner a sum of money equal to that which D'Annunzio had received from Tucker. On December 4, 1988, more than one year before issuance of the superseding indictment and petitioner's trial, D'Annunzio committed suicide.

2. At trial, over petitioner's objections, the district court permitted Agent Little to give testimony about hearsay statements allegedly made to Agent Little by D'Annunzio relating to the alleged bribing of Senators Tucker and Tonkovich. The District Court refused to permit Little to testify about other statements made by D'Annunzio pertaining to the alleged bribery of Governor Moore. Agent Little testified before the jury that D'Annunzio stated that petitioner had approached D'Annunzio on the last day or during the last week of the state legislative session and requested that D'Annunzio bribe members of the legislature. Specifically, Agent Little testified that D'Annunzio said that petitioner approached him and stated: "We've got to get this bill moving. Do you know anyone? Can you go to someone? I've got as high as 20,000 dollars to get the bill moving." C.A. App. 1586. When asked "What did Mr. D'Annunzio say he did after Mr. Ellis indicated that he could go as high as 20,000 to get the bill moving," Agent Little testified that D'Annunzio stated that he went to Senator Tucker and advised him "that he had 10,000 dollars for him if he could get the bill moving," *id.*, and he thereafter went to Senator Tonkovich and made a similar representation. C.A. App. 2011.

D'Annunzio's alleged hearsay statements were critical evidence because they constituted the only direct evidence that petitioner intended that D'Annunzio bribe public offi-

cials rather than performing more traditional lobbying functions. Petitioner testified that he had hired D'Annunzio a year before the 1987 legislative session to work on a related 1986 dog-track bill that was not enacted. Petitioner stated that D'Annunzio had requested $10,000 for his work in 1986 and that petitioner had actually paid him $7,000. C.A. App. 1681, 1683. Petitioner testified that he hired D'Annunzio again to work on passage of the 1987 bill and agreed to D'Annunzio's request for $25,000 for his professional assistance, including the additional expenses D'Annunzio incurred in operating a hotel hospitality suite frequented by legislators. C.A. App. 1697-98. Petitioner testified that he never requested D'Annunzio to bribe legislators or other officials and did not know that D'Annunzio engaged in such activity. Petitioner testified further that he later met with D'Annunzio and accepted the return of $10,000 when D'Annunzio informed petitioner, more than a year after receiving the money, that D'Annunzio still had the money. C.A. App. 1778.

Senator Tucker, appearing as a government witness pursuant to a plea agreement, testified that he spoke with petitioner only once about the dog-track legislation, and petitioner did not offer him any bribe. C.A. App. 1160. On the other hand, Tucker testified that D'Annunzio approached him and said " 'I'll take care of you' or 'I'll see that there's something in it for you,' " in exchange for Tucker's help with the bill. C.A. App. 1168. Tucker further told the jury that after passage of the bill D'Annunzio gave him $10,000, telling Tucker that "it was as a friend he was giving it to me," C.A. App. 1169, 1185, and that Tucker did not know when he received the money that it came from any source other than D'Annunzio. Finally, Tucker testified that approximately a year after the exchange of the money, during the time when D'Annunzio had begun to work with the IRS agents, D'Annunzio informed Tucker that the money had come from Tri-

State Greyhound Park rather than from D'Annunzio. C.A. App. 1185.

Senator Tonkovich also appeared as a government witness pursuant to a plea agreement. He testified that D'Annunzio on several occasions had offered him cash and computer equipment for helping with the 1987 bill, but that in conversations concerning the bill with petitioner, petitioner made no mention of cash or other benefits for Tonkovich. C.A. App. 1064. Tonkovich stated that D'Annunzio came alone when he made his offers, that Tonkovich thought the offer of cash "was absurd," and that D'Annunzio "liked to play the role and he liked to make himself look important." C.A. App. 1060. Thus, the crucial issue at trial was whether D'Annunzio was acting on his own when he offered cash to public officials, or whether D'Annunzio was acting at the request of petitioner or at least with petitioner's knowledge of D'Annunzio's attempted bribes.

The district court recognized the crucial nature of the alleged hearsay statements. The court admitted them under the "catch-all" hearsay exception of Federal Rule of Evidence 804(b)(5), noting that D'Annunzio's statements were

> more probative on the point for which they are offered than any other evidence which the government can procure in that it is Mr. D'Annunzio who can place Mr. Ellis, as well as the money generated by Ellis, to obtain passage of the track legislation with Senator Tucker as a legislator to whom Mr. D'Annunzio went in order to get the bill moving in accordance with defendant's request of Mr. D'Annunzio.

C.A. App. 1580. The district court further ruled that D'Annunzio's hearsay statements were "imbued with circumstantial guarantees of trustworthiness equivalent to those hearsay exceptions otherwise set forth in Rule 804(b)." *Id.* In determining that D'Annunzio's hearsay statements were trustworthy, the district court relied on

corroborating evidence, that is, independent circumstantial evidence that suggested that what D'Annunzio stated may have occurred. But see *Idaho* v. *Wright*, 110 S. Ct. 3139 (1990) (prohibiting such use of corroborating evidence).

The court of appeals affirmed the admission of D'Annunzio's hearsay statements. The court of appeals recognized that the district court's decision was erroneous in light of the intervening decision of this Court in *Idaho* v. *Wright*. App., *infra*, 3a. Nevertheless, the court of appeals considered *de novo* whether the statements were admissible under the Confrontation Clause. The court recognized that the statements, having been admitted under the "catch-all exception" of Rule 804(b)(5), did not fall within any "firmly rooted hearsay exception." App., *infra*, 4a n.1. Nevertheless, the court determined that the statements met the test set forth in *Idaho* for non-traditional hearsay evidence—namely, that such evidence be accompanied by "particularized guarantees of trustworthiness." 110 S. Ct. at 3146 (quoting *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980)); see App., *infra*, 4a.

The court of appeals found the following to be "strong 'indicia of reliability' ": (1) D'Annunzio made the statements voluntarily in the presence of two government agents and his two attorneys; (2) D'Annunzio made the statements in accordance with a plea agreement that required him to be truthful with federal investigators; (3) the government agents were taking notes in the presence of D'Annunzio as the latter spoke; (4) D'Annunzio could be deemed to know, in view of the plea agreement, that what he was saying would be the subject of further investigation and confirmation by the government agents; and (5) D'Annunzio subsequently agreed to record conversations with two of the individuals he implicated, that is, Senator Tucker and petitioner. App., *infra*, 4a.

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an issue of recurring and fundamental importance in the conduct of federal criminal trials in a way that is inconsistent with decisions of this Court and those of other courts of appeals. The Fourth Circuit found that the existence of a plea agreement provides strong indicia of reliability within the meaning of *Idaho* v. *Wright*. In contrast, numerous courts of appeal have held precisely the opposite, *viz.*, that statements made pursuant to a plea agreement are inherently unreliable. The Fourth Circuit's analysis of the reliability of out-of-court statements made by an accomplice pursuant to a plea agreement permitted the United States to establish guilt by using the equivalent of an "ex-parte affidavit or deposition," the precise type of evidence that the Sixth Amendment's Confrontation Clause was adopted to exclude. The Court should grant this petition to provide guidance to the lower courts on the types of factors that will satisfy the Confrontation Clause's requirement that the out-of-court statements of an accomplice possess "particularized guarantees of trustworthiness," and specifically the role, if any, of plea agreements in satisfying that requirement.

1. The Sixth Amendment right of confrontation is "[o]ne of the fundamental guarantees of life and liberty" and is "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the constitution of the United States and in the constitutions of most, if not of all, the states composing the Union." *Kirby* v. *United States*, 174 U.S. 47, 55, 56 (1899); *Pointer* v. *Texas*, 380 U.S. 400, 404 (1965). Numerous opinions of this Court recognize that the Sixth Amendment's Confrontation Clause provides "two types of protection for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 51

(1987). That the right of cross-examination is essential to ensuring the accuracy of the verdict in a criminal trial has been repeatedly emphasized by this Court. *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973); *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970); *Davis* v. *Alaska*, 415 U.S. 308, 315-16 (1974); *Alford* v. *United States*, 282 U.S. 687, 692 (1931). "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process' .... It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'" *Chambers*, 410 U.S. at 295 (citation omitted) (quoting *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) and *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965)).

Because both the Confrontation Clause and the rule against hearsay stress the value of cross-examination in revealing sources of inaccuracy and untrustworthiness, this Court has recognized "the similarity of the values protected" by both. *California* v. *Green*, 399 U.S. 149, 155-56 (1970). But the Court has emphasized that the Confrontation Clause and the hearsay rule are not precisely congruent and has "more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception." *Green*, 399 U.S. at 155-56 (citing *Barber* v. *Page*, 390 U.S. 719 (1968)); *Pointer* v. *Texas*, 380 U.S. 400 (1965). In *Ohio* v. *Roberts*, 448 U.S. 56 (1980), the Court set forth "a general approach" for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause. *Id.* at 64-65. "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity." *Id.* at 65. "In the usual case ..., the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Id.* Second, once

a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* at 66; accord *Idaho*, 110 S. Ct. at 3146.

It is undisputed that the out-of-court statements of D'Annunzio do not fall within any traditional hearsay exception. They were admitted under the "catch-all" or "residual exception" of Fed. R. Evid. 804(b)(5). Statements admitted under Rule 804(b)(5) "almost by definition . . . do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception." *Idaho*, 110 S. Ct. at 3148. Accordingly, D'Annunzio's statements "are 'presumptively unreliable and inadmissible for Confrontation Clause purposes.'" *Id.* (quoting *Lee* v. *Illinois*, 476 U.S. 530, 543 (1986)).

Since *Ohio* v. *Roberts*, the Court has decided two cases involving statements admitted under "residual" or "catch-all" clauses, and has in each case determined that such statements lacked "the particularized guarantees of trustworthiness" required by the Confrontation Clause. *Lee* v. *Illinois*, 476 U.S. 530 (1986) (co-defendant's confession); *Idaho*, 110 S. Ct. 3139 (1990) (statements of child sexual abuse victim).

Lee v. *Illinois* involved statements analogous to D'Annunzio's—that is, an accomplice's hearsay statements inculpated the defendant. In *Lee*, this Court held that the trial judge's express reliance during a bench trial on portions of a co-defendant's confession obtained by police at the time of arrest as substantive evidence against petitioner violated petitioner's right of confrontation as the co-defendant refused under the Fifth Amendment to testify and hence was unavailable for cross-examination.

The majority noted that "[o]ur cases recognize that [the] truth finding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Id.* at 541. The Court found that this "presumption of unreliability that attaches to co-defendants' confessions" was not overcome by a sufficient showing of trustworthiness. *Id.* at 543. In particular, the majority noted that while the confession was voluntary, this fact "does not bear on the question of whether the confession was also free from any desire, motive or impulse . . . either to mitigate the appearance of [declarant's] own culpability by spreading the blame or to overstate [defendant's] involvement in retaliation . . . ." *Id.* at 544.[3]

The nature of the "particularized guarantees of trustworthiness" that will support admission of non-traditional hearsay was further clarified in *Idaho* v. *Wright*. There, this Court indicated that guarantees of trustworthiness consist of circumstances existing at the time a statement is made that evince a declarant's lack of motive to be untruthful and lack of opportunity to be inaccurate. The Court derived this conclusion "from the rationale for permitting exceptions to the general rule against hearsay:

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[3] Significantly, the dissent in *Lee* v. *Illinois*, 476 U.S. 530 (1986) found the co-defendant's confession to be trustworthy only because, under the unique facts of that case, the co-defendant's "statements were thoroughly and unambiguously adverse to his penal interest," bringing the statement within the traditional hearsay exception for "declarations against interest." *Id.* at 551 (Blackmun, J., dissenting). The dissent elaborated that "the unusual conjunction of these indicia of reliability—thorough and unambiguous adversity to Thomas' penal interest, extensive and convincing corroboration by petitioner's own confession, further corroboration provided by physical evidence, and reliable evidence of voluntariness" persuaded the dissent that no violation of the Confrontation Clause had occurred and concluded that "[w]ere any of these elements missing, the result might be different . . . ." *Id.* at 557. Of course, in this case none of these elements is present.

> 'The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation.' "

110 S. Ct. at 3148-49 (quoting 5 J. Wigmore, Evidence § 1420, p. 251 (J. Chadbourne rev. 1974)). Traditional exceptions pertain to statements made "under circumstances that eliminate the possibility of fabrication, coaching, or confabulation . . . ." *Id.* at 3149. The need for proof of lack of motive to fabricate led the Court to prohibit reliance on corroborating evidence to determine the trustworthiness of hearsay statements, *id.* at 3148, 3150, and to conclude that hearsay should be admitted under the Confrontation Clause only when the circumstances surrounding a statement indicate such trustworthiness "that adversarial testing would add little to its reliability." *Id.* at 3149. In other words, the admission of hearsay does not violate the Sixth Amendment where "the declarant's truthfulness is *so clear* from the surrounding circumstances that the test of cross-examination would be of marginal utility . . . ." *Id.* (emphasis added).

2. The court of appeals departed significantly from this Court's prior Confrontation Clause jurisprudence by relying on factors—chiefly, the existence of a plea agreement—that have traditionally been held to indicate a motive to fabricate the truth, rather than the absence of any risk of untruthfulness. Moreover, by relying on the declarant's subsequent willingness to wear a wire to record conversations with petitioner, the court of appeals indirectly considered corroborative evidence, in violation of the explicit holding of *Idaho* v. *Wright*.

The court of appeals listed the folowing five "indicia of reliability":

> First, D'Annunzio issued the statements voluntarily in the presence of two government agents *and* both his attorneys. Second, D'Annunzio made the statements in accordance with a plea agreement which required him to be truthful with federal investigators. Third, the government agents were taking notes in the presence of D'Annunzio as the statements were made. Fourth, D'Annunzio could be deemed to know, in view of the plea agreement, that what he was saying would be the subject of further investigation—and confirmation—by the government. Fifth, though the plea agreement did not require him to do so, D'Annunzio agreed to record subsequent conversations with the individuals he had implicated (Senators Tucker and Ellis), suggesting that he was willing to have the truthfulness of these statements tested.

App., *infra*, 4a. All five largely collapse into the mere fact that D'Annunzio's statements were made pursuant to a plea agreement.

The court of appeals' first factor, voluntariness, ignores the extent to which a declarant is forced to enter into a plea agreement to avoid more serious pending charges. Furthermore, voluntariness, in the sense used by the court of appeals, would apply to virtually all statements given to law enforcement officials pursuant to plea agreements. More fundamentally, this Court has recognized that whether or not a declarant's statement is voluntary

> does not bear on the question of whether the confession was also free from any desire, motive, or impulse [declarant] may have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate [petitioner's] involvement. . . .

Lee, 476 U.S. at 544.

The court of appeals also noted that D'Annunzio's statements were given "voluntarily in the presence of . . . both his attorneys." App., *infra*, 4a. The court of appeals appears to have viewed the presence of D'Annunzio's attorneys as a factor supporting the voluntariness of the statements, rather than directly supporting their truthfulness. As attorneys generally have no personal knowledge of the events a declarant relates to investigators under a plea agreement,[4] the court of appeals correctly treated this factor as proof of voluntariness, rather than being itself an indicator of trustworthiness.

The second factor pertains to the existence of the plea agreement, the inherent unreliability of which will be discussed further below. The third factor, that government agents took notes while D'Annunzio spoke, is irrelevant to whether D'Annunzio had a motive to distort his statements. The fourth factor, that D'Annunzio was aware that his statements would be further investigated by government agents would, again, apply to any statement made under a plea agreement, and is based on the assumption that government agents have the ability to separate the truth from any falsehoods or exaggerations contained in a declarant's statements. This is plainly not so. See *Lee*, 476 U.S. at 545 (discussing the problem of the "selective reliability" of an accomplice's inculpatory statements).[5]

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[4] In this case, in response to the question "I take it that your client never told you anything in private that was inconsistent with what you remember today as to what he said to Agent Little," one of D'Annunzio's attorneys responded:

> No. My client and I had—I was somewhat—I really didn't know—the communication my client made to me with respect to these matters was very, very sketchy. . . . My job was done with the plea bargain and I wasn't really interested in getting the history and I had very little communication with my client about his conduct with the legislators.

C.A. App. 1533.

[5] In the instant case, D'Annunzio allegedly told the agents that petitioner approached him and allegedly stated "Can you go to

The fifth factor, subsequent willingness to wear a wire, is the only factor that would not be true of every statement made under a plea agreement. Yet, D'Annunzio made his decision to wear a wire months after giving the alleged hearsay statements; hence, his decision was not a circumstance surrounding the making of the statements. Furthermore, the worth of this factor depends upon whether a declarant was actually willing to meet with a defendant and, during such a meeting, to discuss matters that corroborate the out-of-court statements given to agents by the declarant. In this case, for example, while D'Annunzio wore a wire, met with petitioner and gave money to petitioner, no statements made during the taped conversations confirmed that petitioner had given money to D'Annunzio with the understanding that it would be used as a bribe.

Moreover, the taped conversations were admissible and were admitted in this case. Their evidentiary value could be weighed directly by the jury. The court of appeals used the existence of the taped conversations *to corroborate* the statements allegedly given previously by D'Annunzio, but this violates the holding of *Idaho* v. *Wright* that prohibits bootstrapping hearsay evidence. In sum, factor five constitutes the impermissible use of corroborative evidence to bolster the credibility of a declarant's statements, while factors one through four reduce to the fact that declarant's statement was made pursuant to a plea agreement.

What makes this holding particularly critical is that the court of appeals has held testimony admissible against a criminal defendant that the Confrontation Clause was

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someone? I've got as high as $20,000 to get the bill moving." No other evidence produced at trial verified that petitioner made this statement or that petitioner gave money to D'Annunzio with the understanding that it would be used to bribe state officials. As the alleged conversation occurred only between D'Annunzio and petitioner, it was not subject to verification by government agents.

specifically adopted to exclude. The Court has consistently noted that the "primary object of the [Confrontation Clause] was to prevent depositions or *ex parte* affidavits" from being used against defendants. *Mattox* v. *United States*, 156 U.S. 237, 242 (1895); see *California* v. *Green*, 399 U.S. 149, 156 (1970); *Dutton* v. *Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring in result); *White* v. *Illinois*, 112 S. Ct. 736, 747 (1992) (Thomas, J. concurring in part and in result). D'Annunzio's alleged hearsay statements were statements made with a view to approaching legal proceedings. They are similar to depositions and *ex parte* affidavits except they are even less reliable because they were not given under oath and were not formalized in a signed statement. If left standing, the court of appeals' opinion "creates a powerful incentive for prosecutors to acquiesce in, or even plan, the unavailability of witnesses in order to prevent live confrontation and cross-examination of witnesses in the courtroom." *United States* v. *Gomez-Lemos*, 939 F.2d 326, 333 (6th Cir. 1991).

3. The court of appeals' holding that the fact that the plea agreement "required [D'Annunzio] to be truthful" is a "strong 'indicia of reliability'" directly conflicts with numerous opinions from other courts of appeal holding that the existence of a plea agreement is an indicator of *un*trustworthiness because it provides a declarant with a motive for currying favor with government investigators and ensures that a declarant's statements are *not* against his or her penal interests.[6] *Gomez-Lemos*, 939

[6] Conversely, the *absence* of any plea bargaining or plea agreement has been held to be a sign that a declarant was not currying favor with investigating officers and was acting against self-interest. *United States* v. *Panzardi-Lespier*, 918 F.2d 313, 316 (1st Cir. 1990) (an indicia of reliability for grand jury testimony is "whether the informant appeared without the protection of immunity"); *United States* v. *Vernor*, 902 F.2d 1182, 1188 (5th Cir.), *cert. denied*, 111 S. Ct. 301 (1990); *United States* v. *Garcia*, 897 F.2d 1413, 1421 (7th Cir. 1990) (declarant "voluntarily made his statement after being

F.2d at 330 (reversing trial court's admission of grand jury testimony and observing that the fact that declarants "entered into plea agreements with the government prior to their grand jury testimony does not necessarily lessen the likelihood that they would want to curry favor with the government, avenge themselves, or spread the blame by implicating defendant"); *United States* v. *Feldman*, 761 F.2d 380, 387-88 (7th Cir. 1985) (reversing admission of prior deposition testimony given under grant of immunity and observing " 'when immunity, plea agreements, or even currying favor with the law enforcement officials is involved, there is substantial likelihood that the statement is self-serving and, thereby, unreliable' ") (quoting *United States* v. *Turner*, 475 F. Supp. 194, 198 (E.D. Mich. 1978)); *United States* v. *Bailey*, 581 F.2d 341 (3d Cir. 1978) (district court abused its discretion under catch-all exception of Rule 804(b)(5) in admitting written and signed hearsay statement given by declarant to investigators pursuant to plea agreement); *United States* v. *Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977) (grand jury testimony inadmissible under either statement against interest or catch-all exceptions where declarant "had been convicted and given immunity").

United States v. *Bailey* and *United States* v. *Turner* are virtually on all fours with the present case. In *Bailey*, the court found that a signed, written statement made by a declarant pursuant to a plea agreement and in the presence of declarant's attorney lacked circumstantial guarantees of trustworthiness. 581 F.2d at 350. In *Turner*, the court held that a signed statement and grand

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advised of his *Miranda* rights and did not enter into any plea agreements with the government"); *United States* v. *Doerr*, 886 F.2d 944, 956 (7th Cir. 1989) (grand jury testimony admissible under Rule 804(b)(5) and Confrontation Clause where given without immunity and thus against penal interest); *United States* v. *Garris*, 616 F.2d 626, 632 (2d Cir.) (admitting custodial statements where "no plea bargaining occurred"), *cert. denied*, 447 U.S. 926 (1980).

jury testimony given during negotiations leading to a plea agreement lacked trustworthiness. 475 F. Supp. at 201.[7]

This Court has itself recognized that the existence of an agreement as to future prosecution is an indicator of untrustworthiness which must be revealed to jurors for their consideration. See *Giglio* v. *United States*, 405 U.S. 150, 154-55 (1972) (requiring prosecutors to disclose all evidence of such agreements and observing "evidence of any understanding or agreement as to a future prosecution would be relevant to [the witness's] credibility and the jury was entitled to know of it"); *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986) (holding that trial court's prohibition on cross-examination of all inquiry into government's dismissal of charges against witness violated Confrontation Clause).

Indeed, it is horn-book law that testimony given pursuant to a plea agreement must be examined by jurors with "particular care." E. Devitt, C. Blackmar & K. O'Malley, *Federal Jury Practice and Instructions: 1991 Cumulative Supplement* § 17.06 at 423 (1991).[8] This fact is reflected in the pattern jury instructions of federal circuits which state that testimony given by the recipient of a plea agreement "must be considered with *more cau-*

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[7] In this case, completion of the plea agreement and actual sentencing hung over D'Annunzio's head as he gave his statements. The plea agreement was not actually signed until January 27, 1988, several days after the January 21st meeting and the very day of the January 27th meeting at which D'Annunzio allegedly made the hearsay statements. Furthermore, D'Annunzio had not been sentenced and investigation of his prior tax payments had not been completed when he allegedly made the hearsay statements.

[8] *See also* 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 17.02 at 524 (3d ed. 1977) ("testimony of an informer who provides evidence against a defendant . . . for immunity from punishment . . . must be examined and weighed by the jury with greater care than the testimony of an ordinary witness").

tion than the testimony of other witnesses."[9] Accord Federal Judicial Center, *Pattern Criminal Jury Instructions*, Instruction 24 at 32 (1988 ed.); see also *United States* v. *Patterson*, 648 F.2d 625, 631 (9th Cir. 1981) ("[f]ailure to give an informant or accomplice credibility instruction requires reversal when the informant or accomplice's testimony is ' "important" to the case' "); *United States* v. *Garcia*, 528 F.2d 580, 587-88 (5th Cir.) (holding that where informer's testimony is crucial, failure to give cautionary instruction is plain error), *cert. denied*, 426 U.S. 952 and *cert. denied*, 429 U.S. 898 (1976). "The purpose of disclosing the terms of a plea bargain is to furnish defense counsel with information which will allow him to attack the credibility of the witness." *United States* v. *Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977) (reversing conviction where prosecutor permitted government witness to withhold all terms of plea agreement).

In reaching its conclusion to admit D'Annunzio's hearsay statements, the Fourth Circuit followed a prior Fourth Circuit opinion that concluded that statements made pursuant to a plea agreement possessed sufficient guarantees of trustworthiness. App., *infra*, 4a-5a (citing

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[9] U.S. Eleventh Circuit District Judges Association, *Pattern Jury Instructions: Criminal Cases*, Instruction 1.2 at 35 (1985 ed.) (emphasis added); *accord* U.S. Sixth Circuit District Judges Association, *Pattern Criminal Jury Instructions*, Instruction 7.07 at 152 (1991 ed.); Committee on Model Jury Instructions: Ninth Circuit, *Manual of Model Criminal Jury Instructions for the Ninth Circuit*, Instructions 4.09-4.12 at 58-61 (1989 ed.) (instructions for testimony under grant of immunity, of informer, of accomplice, of witness who has pleaded guilty); *see* U.S. Fifth Circuit District Judges Association, *Pattern Jury Instructions: Criminal Cases*, Instruction 1.16 at 27 (1990 ed.) (testimony of recipient of plea agreement "is always to be received with caution and weighed with great care"); Committee on Federal Criminal Jury Instructions of the Seventh Circuit, *Federal Criminal Jury Instructions of the Seventh Circuit*, Instructions 3.19-3.23 at 41-45 (1980 ed.) (testimony given under immunity, or of informer, perjurer or accomplice "must be considered with caution and great care").

United States v. *Workman*, 860 F.2d 140 (4th Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989)). Contrary to the opinions of other courts of appeal and to the jury instructions cited above, *Workman* concluded that the declarant's statement made pursuant to a plea agreement constituted a "statement against interest." 860 F.2d at 144. *Workman* further concluded that the trial court's findings that the hearsay statement had been given voluntarily, in the presence of declarant's attorneys, and was tape-recorded constituted "guarantees of trustworthiness." *Id.* The Fourth Circuit is thus charting a course in conflict with that of other circuits. This Court should grant certiorari to resolve the conflict between the Fourth Circuit and other federal circuits concerning whether the fact that a statement is made pursuant to a plea agreement containing a truth-telling obligation constitutes a "particular guarantee of trustworthiness."

4. The court of appeals' decision to admit the out-of-court inculpatory accusations of a co-conspirator conflicts with opinions of this Court which have held such statements to be "inevitably suspect." *Bruton* v. *United States*, 391 U.S. 123, 136 (1968). In *Bruton*, the Court held that because of the substantial risk that the jury, despite limiting instructions to the contrary, considered the inculpatory out-of-court statements made by a non-testifying co-defendant in determining petitioner's guilt during a joint trial, admission of the co-defendant's confession violated petitioner's right of cross-examination secured by the Confrontation Clause. *Id.* at 126. The Court noted with respect to the "incriminating extrajudicial statements of a co-defendant" that:

> Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accom-

> plice, as here, does not testify and cannot be tested by cross-examination.

Id. at 135-36 (footnote omitted).[10] In concurrence, Justice Stewart observed that "certain kinds of hearsay," including the out-of-court statement of a co-defendant, "are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give." *Id.* at 138 (Stewart, J., concurring). Justice Stewart continued:

> It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused, rather than admissible for the little it may be worth.

Id.

The Court has held that cross-examining government agents about the statement given by a defendant's accomplice "could not substitute for cross-examination of [the declarant] to test the truth of the statement itself." *Douglas* v. *Alabama*, 380 U.S. 415, 420 (1965). This Court reaffirmed in *Lee* v. *Illinois* that "the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." 476 U.S. at 541. In *Lee*, the Court focused on two major sources of unreliability pertaining to an accomplice's con-

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[10] The Court has recognized that "it [is] the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence . . . ." *Caminetti* v. *United States*, 242 U.S. 470, 495 (1917); *see Crawford* v. *United States*, 212 U.S. 183, 203-04 (1909) (the testimony of "a confessed accomplice" who has "turned 'State's evidence'" should "be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses. In many jurisdictions such a man is an incompetent witness unless he has been pardoned").

fession. First, there frequently exist "circumstances in which the [accomplice] stands to gain by inculpating another." *Id.* Second, "[t]he true danger inherent in this type of hearsay is, in fact, its selective reliability." *Id.* at 545; see *Douglas* v. *Alabama*, 380 U.S. at 419.[11]

Both of the factors enumerated in *Lee* are present here. By accusing petitioner of masterminding the alleged extortion, D'Annunzio shifted blame away from himself and could have been currying favor with IRS investigators who were then investigating his prior tax filings and who would make recommendations at his pending sentencing. Moreover, D'Annunzio may have felt or been pressured to implicate other individuals in order to obtain the plea agreement.[12] Given D'Annunzio's suicide, it is impossible to know what may have motivated him to make the alleged statements.[13] In sum, "co-conspirators who have entered into a plea agreement or those who have been given use immunity by the government still often possess the motivations to lie noted in *Lee*." *United States* v. *Gomez-Lemos*, 939 F.2d 326, 333

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[11] This second factor refers to the ability of an accomplice to give a statement that is true in part but also false with respect to significant details that inculpate the defendant.

[12] As noted previously, the plea agreement was not actually signed until January 27, 1988, several days after the January 21st meeting and the very day of the January 27th meeting at which D'Annunzio allegedly made the hearsay statements, and D'Annunzio had not been sentenced when he allegedly made the statements.

[13] The court of appeals failed to consider that the very cause of D'Annunzio's unavailability sheds further doubt on the reliability of his hearsay statements. At trial, a close friend of D'Annunzio's testified that more than one year before his suicide, and prior to entering into a plea agreement, D'Annunzio felt suicidal and sought psychiatric help because of newspaper articles that had appeared questioning his financing of a house in which a West Virginia legislator lived and suggesting that he had engaged in acts of extortion. C.A. App. 1627-28. *See United States* v. *Fisher*, 28 M.J. 544, 547 (A.F.C.M.R. 1989) ("[s]uicide can demonstrate a guilty conscience over bringing charges" and "[s]uicide attempts can be a factor weighing against credibility").

(6th Cir. 1991). Furthermore, the alleged hearsay statement is precisely the type of accusation subject to selective reliability. Although it is true that both petitioner and D'Annunzio worked for passage of the racing bill, the selectively unreliable portion of the hearsay is the accusation that petitioner intended D'Annunzio to use money to bribe state officials.

The court of appeals erred in failing to consider the motivations D'Annunzio had for shading the truth and the potential for selective reliability in his statements, that is, the factors enumerated in *Lee* v. *Illinois*, *Bruton*, and *Douglas* v. *Alabama*. The Court should hear this case to consider the similarities between accomplice confessions given shortly after arrest and those given pursuant to a plea agreement, and whether there existed here sufficient particularized guarantees of trustworthiness to "overcome the weighty presumption against such uncross-examined evidence." *Lee* v. *Illinois*, 476 U.S. at 546.

5. As the preceding discussion reveals, this Court's decisions establish *two* presumptions against admission of D'Annunzio's statements. One presumption stems from the fact that D'Annunzio's statements constituted the inculpatory accusations of an accomplice. This Court has frequently found that the circumstances surrounding such hearsay lacked "sufficient 'indicia of reliability' . . . *to overcome* the weighty presumption against the admission of such uncross-examined evidence." *Id.* (emphasis added). A second presumption against admissibility stems from the fact that D'Annunzio's statements were admitted under the catch-all hearsay exception of Rule 804(b)(5) and thus did not fall within any firmly-established exception to the rule against hearsay. In the two cases in which this Court has considered whether hearsay admitted under Rule 804(b)(5) violated the Confrontation Clause, the Court has placed an added burden of persuasion on the government:

> Given the presumption of inadmissibility accorded accusatory hearsay statements not admitted pursu-

> ant to a firmly rooted hearsay exception, *Lee*, 476 U.S., at 543 . . . we agree with the court below that the State has failed to show that the younger daughter's incriminating statements to the pediatrician possessed sufficient "particularized guarantees of trustworthiness" under the Confrontation Clause *to overcome* that presumption.

Idaho v. *Wright*, 110 S. Ct. 3139, 3152-53 (1990) (emphasis added).

It is clear from the analysis employed in *Idaho* that the Court used the "presumption of inadmissibility" that attaches to non-traditional hearsay as an evidentiary counter-weight that the government was required "*to overcome*" by making a particularly strong showing of trustworthiness. Moreover, the Court's requirement that the government must meet a heightened standard in proving the trustworthiness of non-traditional hearsay is thoroughly justified by both the "ad-hoc" nature of such hearsay, *Idaho*, 110 S. Ct. at 3147, and also by Congress' intention that the catch-all exception would be applied only in exceptional cases. *United States* v. *Bailey*, 581 F.2d 341, 346 (3d Cir. 1978).

The court of appeals ignored these presumptions in upholding petitioner's conviction on the basis of D'Annunzio's hearsay statements. Unlike the Supreme Court of Idaho which "properly focused on the presumptive unreliability of the out-of-court statements," *Idaho*, 110 S. Ct. at 3152, the court of appeals ignored the teachings of this Court in *Idaho* and *Lee* and this failure warrants review by this Court.

6. Finally, the Fourth Circuit ignored the fact that D'Annunzio's statements were made under specific circumstances that further contributed to their unbelievability and that failed to ensure an accurate reporting of what D'Annunzio actually said. Despite the obvious importance of the information D'Annunzio allegedly provided, the IRS special agents failed to use any steno-

graphic or video means to preserve his statements. Nor did they have D'Annunzio sign a written statement, or even initial the notes taken by the IRS agents, despite working with him for almost a full year. This failure significantly undercuts the reliability of D'Annunzio's statements.

Moreover, the lack of a verbatim transcript, video tape, or even a mere signed statement and the particular circumstances surrounding the government's interrogation of D'Annunzio cast serious doubt on whether D'Annunzio actually made the statements attributed to him by the IRS agents. For example, Agent Little purported to be testifying based on notes he took at the two meetings. The meetings each lasted approximately three-and-one-half hours. Yet Agent Little's notes for the January 21st meeting consisted of only one-and-one-half pages pertaining to petitioner. C.A. App. 2095.[14] The notes for the January 27th meeting consisted of two paragraphs pertaining to petitioner. C.A. App. 2096. Moreover, Little's notes reflected considerable editing by the agent. C.A. App. 2075, 2080-82.

The court of appeals did nothing to remedy these problems. To the contrary, it refused to make a determination as to the accuracy of the government's recounting of the hearsay statements. See App., *infra*, 5a. Under these circumstances, the court at a minimum should have required the record to demonstrate additional indicia of accuracy. Compare *United States* v. *Love*, 592 F.2d 1022, 1026 (8th Cir. 1979) (holding statement inadmissible under 804(b)(5) (the catch-all exception) and 804(b)(3) (against penal interest exception) where "statement was not made under oath, was oral and later transcribed by [FBI agent], was made . . . in custody," and may have appeared to declarant to be in her penal interest); *United States* v. *Petit*, 841 F.2d 1546, 1555 n.13 (11th Cir.), *cert. denied*, 487 U.S. 1237 (1988), with *United States*

[14] By contrast, when Agent Little interviewed petitioner for four hours on September 30, 1988, Little took 30 pages of notes. C.A. App. 2096.

v. *Garris*, 616 F.2d 626, 632 (2d Cir.) (admitting testimony based on notes where agent took notes "abbreviating nothing of substance," and *declarant* reviewed notes at trial for accuracy), *cert. denied*, 447 U.S. 926 (1980). It did not.

* * * *

The Court should resolve the conflict between the Fourth Circuit and other circuits over whether the fact that a statement is made pursuant to a plea agreement by an individual whose motives are suspect can satisfy the particularized guarantee of trustworthiness required by the Confrontation Clause. This issue has arisen repeatedly in the past and will continue to do so and warrants review by the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 10, 1992

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 90-5726, 91-5771

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WILLIAM T. ELLIS,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
WILLIAM T. ELLIS,
Defendant-Appellant.

Argued: Oct. 3, 1991

Decided: Dec. 12, 1991

As Amended Jan. 7, 1992

Franklin Dorrah Cleckley, Morgantown, W.Va., argued (Phillip D. Gaujot, Charleston, W.Va., on the brief), for defendant-appellant.

Joseph F. Savage, Jr., Asst. U.S. Atty., Huntington, W.Va., argued (Michael W. Carey, U.S. Atty., Huntington, W.Va., on the brief), for plaintiff-appellee.

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, and PHILLIPS and NIEMEYER, Circuit Judges.

OPINION

POWELL, Associate Justice:

The principal questions presented in this appeal are whether the district court erred in admitting hearsay statements of a deceased witness, in allowing discovery of the Appellant's personal notes, and in calculating the Appellant's sentence. For reasons that follow, we affirm the Appellant's conviction and his sentence.

I

Appellant William Ellis was a 20% limited partner of Tri-State Greyhound Park, Inc. (Tri-State), a West Virginia corporation that operates pari-mutuel betting on greyhound races. Under West Virginia law, facilities like Tri-State are allowed to keep a specific percentage—the "takeout"—of the revenue generated by public wagers. In 1986 the owners of Tri-State, faced with unanticipated shortfalls in revenue, supported a proposed bill that would have increased their "takeout" percentage. The 1986 "takeout" bill received the support of both houses of West Virginia's bicameral legislature, but was subsequently vetoed by the Governor.

In 1987, a similar bill was introduced and renewed efforts were made to obtain support for it. To this end, Tri-State promised to pay Ellis $500,000 if the bill became law. Ellis proceeded in a variety of allegedly fraudulent ways to assure passage of the bill. He worked primarily through Samuel D'Annunzio, a seasoned West Virginia lobbyist, providing him with sums of cash, among other things, with which to influence various state legislators.

The West Virginia legislature eventually passed, and the Governor signed, the 1987 bill. Soon afterwards, a federal investigation into charges of corruption surrounding passage of the 1987 bill was initiated. As a consequence of that investigation, D'Annunzio entered into a plea agreement with the federal government. D'Annunzio

met several times with federal agents, elaborating the methods used to further the scheme and detailing the nature of his relationship with Ellis. D'Annunzio also secretly recorded conversations with Ellis and other participants in the scheme. On December 4, 1988, in the midst of the investigation, D'Annunzio committed suicide.

On the basis of information provided by D'Annunzio and others, Ellis was indicted. The superseding indictment charged eight counts of Hobbs Act, mail fraud, racketeering, and obstruction of justice violations. A jury convicted Ellis on all of the counts except two—the mail fraud charge and a substantive extortion charge. The district court sentenced Ellis to 107 months and fined him $50,000.

II

A

Ellis first argues that the district court violated his rights under the Confrontation Clause by admitting hearsay statements of deceased witness Samuel D'Annunzio that did not bear sufficient "indicia of reliability." Ordinarily we review the admission of hearsay statements for abuse of discretion. *United States v. Hinkson*, 632 F.2d 382, 385 (4th Cir.1980). In this case, however, de novo review is appropriate. For shortly after the jury returned its verdict, the Supreme Court issued a decision that bears on this question. In *Idaho v. Wright*, —— U.S. ——, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), the Court held that, for purposes of the Confrontation Clause, the presence of corroborating evidence may not be considered in determining the reliability of hearsay testimony. Because the district court relied on corroborating evidence in admitting D'Annunzio's statements, we must determine whether the statements otherwise were properly admissible.

A two-part test determines whether "incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation

Clause." *Id.* 110 S.Ct. at 3146 (citing *Ohio v. Roberts*, 448 U.S. 56, 65, 100 S.Ct. 2531, 2538, 65 L.Ed.2d 597 (1980)). The prosecution first must show that the declarant was unavailable. *Id.* Then it must demonstrate that the statements have the necessary "indicia of reliability." *Id.* This latter requirement is met, *Idaho* instructs, in one of two ways: either by showing that the statements "fall[] within a firmly rooted hearsay exception" or by showing that the statements bear sufficient guarantees of trustworthiness. *Id.*

Applying this standard, we think that D'Annunzio's statements were properly admitted. The circumstances in which D'Annunzio made the statements provided strong "indicia of reliability."[1] First, D'Annunzio issued the statements voluntarily in the presence of two government agents *and* both of his attorneys. Second, D'Annunzio made the statements in accordance with a plea agreement which required him to be truthful with federal investigators. Third, the government agents were taking notes in the presence of D'Annunzio as the statements were made. Fourth, D'Annunzio could be deemed to know, in view of the plea agreement, that what he was saying would be the subject of further investigation—and confirmation—by the government. Fifth, though the plea agreement did not require him to do so, D'Annunzio agreed to record subsequent conversations with the individuals he had implicated (Senators Tucker and Ellis), suggesting that he was willing to have the truthfulness of these statements tested.

This Court's decision in *United States v. Workman*, 860 F.2d 140 (4th Cir.1988), *cert. denied*, 489 U.S. 1078, 109 S.Ct. 1529, 103 L.Ed.2d 834 (1989), is persuasive—though perhaps not controlling—authority that D'Annunzio's statements should have been admitted. *Workman* also involved the statements of a deceased witness that

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[1] Rule 804(b)(5), a residual provision, is not a traditional hearsay exception. *Cf. Idaho*, 110 S.Ct. at 3147.

were obtained in the course of a plea agreement. And this Court approved the admission of those statements under quite similar circumstances. The only relevant difference between the indicia of reliability in *Workman* and in this case is that *Workman* contained one additional measure of reliability—a tape recording of the declarant's statements. *See Workman*, 860 F.2d at 142-46.

This distinction, however, does not compel a different outcome in this case. Other factors—particularly the presence of D'Annunzio's two attorneys—strongly suggest that the statements were trustworthy. Moreover, the principal danger of the absence of a tape recording—the accuracy of the hearsay statements—was not challenged seriously in this case. Charles Little, an agent with the Internal Revenue Service, testified to his recollection of D'Annunzio's statements on the basis of notes he had taken at the meetings with D'Annunzio. Three other witnesses attended those meetings, two of whom (D'Annunzio's attorneys) had interests adverse to those of the government. Ellis chose not to call any of these participants to challenge Agent Little's recollection of D'Annunzio's statements. We therefore assume that the accuracy of the statements was not questioned.

Ellis also contends that the Supreme Court's decision in *Idaho* overrules an aspect of the *Workman* analysis upon which the district court relied. He specifically attacks *Workman's* statement that a declarant's willingness to record conversations with conspirators bears on the truthfulness of the declarant's earlier statements. Language in *Idaho*,[2] Ellis claims, indicates that this factor no longer is relevant to the reliability inquiry because this particular circumstance did not exist at the time

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[2] Ellis relies on the following language: "the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Idaho*, 110 S.Ct. at 3148.

D'Annunzio made the statements. We do not think, however, that *Idaho* placed a time bar on the circumstances that may be used to demonstrate the reliability of hearsay statements. Such a reading of the case would extend the decision well beyond the question presented (is corroborating evidence an indicia of reliability?); would conflict with other portions of the opinion, *see, e.g.*, *Idaho*, 110 S.Ct. at 3148 ("we decline to read into the Confrontation Clause a preconceived and artificial litmus test") and *id.* at 3150 ("courts have considerable leeway in their consideration of appropriate factors. We therefore decline to endorse a mechanical test for determining 'particularized guarantees of trustworthiness' under the [Confrontation] Clause."); and would remove from consideration a factor that logically bears on the central issue under the Confrontation Clause—whether the statements are trustworthy. In our view *Idaho* neither directly nor by implication overruled this aspect of the *Workman* analysis.

In sum, the statements had sufficient indicia of reliability to meet the requirements of the Confrontation Clause. And given the circumstances in which the statements were made, cross-examination would have had only "marginal" value in this case. *Id.* at 3149.

B

Ellis further argues that the district court erred in allowing the government to discover two of his appointment books and certain personal notes (collectively, "appointment books"). We disagree. A Defendant who testifies waives his Fifth Amendment privilege in all areas subject to proper cross-examination. *Brown v. United States*, 356 U.S. 148, 154-56, 78 S.Ct. 622, 626-27, 2 L.Ed.2d 589 (1958). Proper cross-examination—and therefore waiver—reaches all subject matters relevant to the direct examination. *See Johnson v. United States*, 318 U.S. 189, 195, 63 S.Ct. 549, 552, 87 L.Ed. 704 (1943) ("waiver as to all other relevant facts") (cita-

tion omitted); Fed.R.Evid. 611(b). In this instance Ellis took the stand and testified about the dates, places, and subject matter of various meetings involved in the alleged bribery scheme. This testimony related directly to entries in his appointment books. Ellis also admitted that he consulted the appointment books to refresh his memory both before and after meeting with federal agents. The pertinence of the information in the appointment books to his direct testimony, together with his reliance on them to refresh his memory, fully supported the district court's decision.[3] *See United States v. Black*, 767 F.2d 1334, 1341 (9th Cir.), *cert. denied*, 474 U.S. 1022, 106 S.Ct. 574, 88 L.Ed.2d 557 (1985).

III

Ellis next argues that the district court improperly enhanced his sentence under § 3B1.1(a) and § 2C1.1(b)(2)(A) of the United States Sentencing Commission, *Guidelines Manual* (Guidelines). We review both challenges, the parties agree, for clear error. *See United States v. Sheffer*, 896 F.2d 842, 846 (4th Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 112, 112 L.Ed.2d 82 (1990).

Section 3B1.1(a) prescribes a four-level increase in offense level "[i]f the Defendant was an organizer or

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[3] Ellis also argues that Rules 16, 17, and 26.2 of the Federal Rules of Criminal Procedure barred discovery of the appointment books. The argument suggests—though it does not explicitly state—that these rules extend a Defendant's protection from discovery further than the Fifth Amendment. Because this novel contention lacks any foundation in either the language of the rules, *see*, e.g., Rule 16(b)(1) and (b)(2), Rule 17(c) and (h), Rule 26.2(a) and (f), or the case law, *see*, e.g., *United States v. Nobles*, 422 U.S. 225, 235, 95 S.Ct. 2160, 2168, 45 L.Ed.2d 141 (1975) ("Both the language and history of Rule 16 indicate that it addresses only pretrial discovery. . . . This hardly suggests any intention that the Rule would limit the court's power to order production once trial has begun."), we reject it.

leader of a criminal activity that involved five or more participants or was otherwise extensive." Relying on the fact that D'Annunzio, not Ellis, knew the senators necessary to obtain passage of the legislation, Ellis claims that he did not exercise the requisite degree of control over the scheme to merit an enhancement. This argument is unpersuasive. Even if Ellis did rely on D'Annunzio's contacts, and even if D'Annunzio's contacts were essential to the scheme, these factors do not necessarily show that Ellis was merely a peripheral member of the bribery scheme. Other evidence firmly supported the conclusion that Ellis orchestrated the scheme.[4]

The evidence also supports the court's finding that the criminal activity was "extensive." The scheme involved four major participants—Ellis, D'Annunzio, and Senators Tucker and Tonkovich—as well as other lobbyists, legislators and their staffs. In considering whether an activity is "otherwise extensive," a court may consider, as it did here, "all persons involved during the course of the entire offense," even the "unknowing services of many outsiders." § 3B1.1, comment. (n. 2).

Ellis challenges all four components of the district court's sentencing determination under § 2C1.1(b)(2)(A).[5] We need consider only two aspects of that calcula-

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[4] The evidence showed that Ellis supplied the money for the conspiracy and authorized expenditures to further it; he recruited members of the conspiracy, i.e., D'Annunzio; and he stood substantially to benefit from passage of the "takeout" bill. Each of these factors tends to show a leadership or organizational role in the crime. *See* § 3B1.1, comment. (n. 3). Cumulatively they support the factual finding on this point.

[5] Section 2C.1.1(b)(2)(A) increases a Defendant's offense level "[i]f the value of the bribe or the benefit received, *or to be received*, in return for the bribe exceeded $2000". (Emphasis added.) The extent of that increase is determined under § 2F1.1(b)(1). This latter provision authorizes the sentencing judge to increase the offense level from one to eighteen levels depending on the anticipated benefit from the crime. In this case the court

tion, however, as they place the benefit to be received above the $800,000 minimum necessary for an eleven-level enhancement. Contrary to Ellis' contention, the district court properly included in this calculation the $500,000 payment that Tri-State promised Ellis if the bill was passed. Although Tri-State later reneged on this commitment (apparently after the bill became law), Ellis testified, and other taped conversations revealed, that he expected to receive the payment if his "lobbying" efforts were successful. The evidence also supports the court's determination that Ellis' 20% interest in Tri-State, amounting to $602,109, was a benefit received from passage of the "takeout" bill. Again, Ellis' own testimony supported the calculation. Passage of the legislation, Ellis testified, was essential to maintaining Tri-State as an operating business entity. Further supporting each of these findings is Ellis' admission at trial that he anticipated "mak[ing] millions off of" the bill.

In its cross-appeal, the government makes several arguments to the effect that the court *under*-calculated the § 2C1.1 enhancement for benefit received. The district court, the government claims, took an overly restrictive view of the guideline by focusing on personal benefit to the *Defendant* from the bribery scheme. Instead, the government asserts, the court should have considered the total profit (over 11 million dollars) to the two race tracks—Tri-State and Wheeling Downs—from the scheme.

The government claims that this approach is sanctioned by language from *other* provisions of the Guidelines that focuses on the total loss or harm caused by the offense. These provisions, however, show only that the drafters of the Guidelines knew how to prescribe punishment on this basis, not that they intended to in drafting § 2C1.1. Equally unavailing is the government's reliance on the

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found that Ellis anticipated making $1,231,636.87, which merited an eleven-level increase.

principle that a conspirator must answer for his conduct *and* for all foreseeable consequences of it. *See Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). Neither the provision itself nor precedent requires that vicarious liability apply to § 2C1.1 calculations.

Finally, the government claims that a recent Fourth Circuit case adopts the government's theory. In *United States v. Muldoon*, 931 F.2d 282, 289 (4th Cir.1991), the Court suggested in a one-paragraph discussion that a sentencing court might look at bribe-generated benefits from a corporate perspective (i.e., net profit), not just the perspective of the individual responsible for making the bribe. *Muldoon*, however, is not controlling. First, the discussion is *dictum*. In making its calculation the *Muldoon* Court ultimately relied on the amount of the bribes transmitted by the Defendant, not the benefit derived by the corporation from the bribes. Second, *Muldoon* involved discrete government contracts, for which there is a reliable measure of the total benefit received—net profit on the illegally obtained contract. In contrast, calculating the total benefit received by companies who profit from improperly passed legislation is a far less certain endeavor, one that (as this case suggests) is potentially limitless in reach.

We have reviewed the parties' other contentions and also find them to be without merit. Accordingly, the judgment is

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

Criminal Action No. 2:89-00242

UNITED STATES OF AMERICA
v.
WILLIAM T. ELLIS

MEMORANDUM ORDER
[Entered Oct. 24, 1990]

The defendant, William T. Ellis, was convicted of six offenses consisting of one count of conspiracy to cause extortion, two counts of causing extortion and one count each for violation of RICO, conspiracy to violate RICO and obstruction of justice. The defendant filed post-verdict motions seeking, *inter alia*, a new trial on the principal ground that the receipt in evidence of statements implicating the defendant, made by the decedent, Samuel D'Annunzio, was improper.

I.

The defendant was convicted of counts charging the defendant with an extortion scheme with respect to the passage of dog track legislation favorable to track owners, of which the defendant was one. Central to the scheme was the charge that the defendant had come to D'Annunzio late in the 1987 session of the legislature when the outcome of the dog track bill was in doubt and asked for D'Annunzio's assistance in getting the bill moving. The defendant is said to have told D'Annunzio that he had $20,000 for that purpose. D'Annunzio pro-

ceeded to offer $10,000 to former Senator Larry Tucker, then majority leader of the West Virginia Senate, for help on the bill, which $10,000 was later given to Tucker by D'Annunzio.[1] Similarly, D'Annunzio offered $10,000 in cash and later some computer equipment to former Senator Dan Tonkovich, then president of the State Senate, for that same purpose. D'Annunzio's statements admitted into evidence related to the pay-off efforts made to the two senators, including the defendant's role in coming to D'Annunzio with $20,000 "to get the bill moving."

Before making the statements, D'Annunzio had become the subject of an investigation by the United States. In January, 1988, he entered into a plea agreement under which he agreed to plead guilty to an information to be filed charging him with submitting a false and fraudulent tax return in violation of Title 26, United States Code, Section 7206(1). The plea agreement was dated January 13, 1988, and signed by the defendant and his attorney on January 27, 1988. During the time the language of the plea agreement was being finalized, D'Annunzio on January 21, 1988, and again on January 27, 1988, made a number of statements relating to the involvement of D'Annunzio and the defendant in the extortion scheme. Present on those two occasions were IRS Agents Charles Little and Donald Miller and D'Annunzio's attorneys, Rudolph DiTrapano and Rebecca Baitty.

The D'Annunzio statements were ultimately admitted into evidence insofar as they related to the Tucker and Tonkovich transactions. The court did so in accordance with the decision of the Fourth Circuit Court of Appeals, binding on this court, in *United States* v. *Workman*, 860 F.2d 140 (4th Cir. 1988). Since the conclusion of the trial on May 17, 1990, the validity of the *Work-*

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[1] Over a year later, Tucker returned the $10,000 to D'Annunzio, who thereupon returned it to the defendant in an exchange monitored by government agents.

man decision has been called into question by the decision of the United States Supreme Court on June 27, 1990, in *Idaho* v. *Wright*, 110 S. Ct. 3139.

In *Workman*, the statement of a decedent who, as a go-between, had knowingly arranged for the sale of a stolen truck-load of liquor to the defendant Workman, was received in evidence. The Fourth Circuit found the statement admissible under the residual hearsay exception of Rule 804(b)(5) of the Federal Rules of Evidence.[2] Rule 804(b)(5) permits the admissibility of the declaration of a witness who is unavailable where the statement is imbued with circumstantial guarantees of trustworthiness equivalent to that of the other hearsay exceptions contained in Rule 804(b).[3]

The Fourth Circuit relied on the decedent's willingness, one month after the statement was given, to permit

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[2] Rule 804(b)(5) of the Federal Rules of Evidence provides as follows:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

[3] The other four hearsay exceptions contained in Rule 804(b) are as follows: (1) Former testimony; (2) Dying declaration; (3) Statement against interest; and (4) Statement of personal or family history.

himself to be wired in order that his conversation with Workman could be monitored by the authorities and tape-recorded. Although the Fourth Circuit found equivalent circumstantial guarantees of trustworthiness on the ground that the decedent's statement constituted an admission against interest under Rule 804(b)(3), the court nevertheless found admissibility only under the residual hearsay exception of Rule 804(b)(5).

On the admissibility issue, this case is identical in all material respects to *Workman*.[4] The decedent D'Annunzio, several months after giving the statements earlier-noted in January, 1988, permitted himself to be wired and his separate conversations with Senator Tucker and the defendant on multiple occasions to be monitored and recorded by audiotape and, to a lesser extent, by videotape.

Immaterial is the difference in the manner in which the decedent statements in *Workman* and this case were obtained. In *Workman*, the statement was tape-recorded at the instance of the declarant's attorney, was given in the form of answers to questions posed by the government agent, and was taken in the presence as well of the declarant's attorney who kept the tape in his possession. In the instant case, the decedent's statements, although not tape-recorded, were the subject of notes by Agent Little, as well as Agent Miller, the pertinent content of which has since been essentially agreed to as being accurate by the decedent's attorneys who were present. At a hearing outside the presence of the jury, the court received the testimony of Agent Little and the two attorneys and found the statements attributed to D'Annunzio to be accurately reflected by the notes of Agent Little. The defendant did not challenge the accuracy of the statements related by Agent Little at trial by call-

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[4] The instant action also involves a web of corroborating circumstances which, prior to *Idaho* v. *Wright*, seemed to further strengthen the basis for admissibility.

ing either of D'Annunzio's attorneys or Agent Miller. As indicated in *Idaho* v. *Wright*, no fixed set of procedural prerequisites is imposed as a condition precedent to admissibility under the Confrontation Clause. *Id.* at 3148.

Although the statements by D'Annunzio constituted an admission against interest to the same extent as did the decedent's statement in *Workman*, this court chose not to rest equivalency on that ground. The statement of a cooperating accomplice must be viewed with healthy skepticism, for the motive to falsify in order to curry favor with the authorities is often present. *See* Notes of Advisory Committee re Rule 804(b)(3); *Lee* v. *Illinois*, 476 U.S. 350, 106 S.Ct. 2056, 2061-64 (1986) (a co-defendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another). Nevertheless, the cooperation of an accomplice witness with the authorities to the extent of meeting with suspects and allowing the meeting to be observed and the conversation recorded lends a high degree of trustworthiness to the statement. *United States* v. *West*, 574 F.2d 1131, 1137-38 (4th Cir. 1978). Similar circumstances have been held sufficient to meet the requirements of Rule 804(b)(5) and of the Confrontation Clause. *Id.*

In order to satisfy the indicia of reliability and high level of trustworthiness required by both the Confrontation Clause and Rule 804(b)(5), this court not only relied upon the willingness of the decedent to demonstrate his conviction in the truth of his statements by submitting to the monitoring of his conversations with Senator Tucker and the defendant, but also found a host of other corroborating circumstances as outlined by the court in its findings at trial.

After the trial was concluded, the Supreme Court in *Idaho* v. *Wright*, in a five to four decision, noted that a residual hearsay exception, such as that at issue here under Rule 804(b)(5), is not a firmly rooted hearsay exception for Confrontation Clause purposes as is, for example, a dying declaration.[5] *Id.* at 3147-49.[6] Consequently, in order to gain admissibility under Rule 804 (b)(5) for Confrontation Clause purposes, there must at least be a showing of particularized guarantees of trustworthiness. *Id.* at 3148.

The majority in *Wright* holds that while " 'particularized guarantees of trustworthiness' must be shown from the totality of the circumstances, . . . the relevant circumstances include only those that surround the mak-

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[5] Other firmly rooted hearsay exceptions would include those otherwise specified in Rule 804(b) such as former testimony or admission against interest.

[6] As stated by the Court in *Idaho* v. *Wright*:

> Our precedents have recognized that statements admitted under a "firmly rooted" hearsay exception are so trustworthy that adversarial testing would add little to their reliability.

110 S.Ct. at 3149. The Court also noted that:

> Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements.

110 S.Ct. at 3147. It was further observed by the Court that:

> [I]f the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial. The basis for the "excited utterance" exception, for example, is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous.

110 S.Ct. at 3149.

ing of the statement and that render the declarant particularly worthy of belief." *Id.* at 3148. Although the four dissenters in *Wright* vigorously insist that corroborating circumstances are also to be taken into account and suggest that any other view will prove unworkable, the decision in *Wright* has cast grave doubt over the continuing vitality of *Workman*.[7]

The government urges that the willingness of D'Annunzio, like the decedent in *Workman*, to encounter his accomplices in monitored conversations constitutes a surrounding circumstance that renders the declarant particularly worthy of belief. Surely D'Annunzio's demonstration in this respect renders him particularly worthy of belief. However, the passage just quoted from *Wright* should be considered in light of the majority's observation that "[t]o be admissible under the Confrontation Clause, hearsay evidence . . . must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Idaho* v. *Wright* at 3150. It is also to be considered in light of the reference, in the majority opinion, to *Lee* v. *Illinois*, *supra*, as indicating that indicia of reliability is to be found from the circumstances surrounding the making of the statement, and *State* v. *Ryan*, 691 P.2d 197 (Wash.1984), as indicating that such surrounding circumstances do not include subsequent corroboration of the criminal act. *Id.* at 3149-50.

It is correct, as the government insists, that the willingness of D'Annunzio to be monitored is not simply corroboration of the criminal act but graphically demonstrates his belief in the truth of that which he had stated. Yet, the decedent's willingness to be taped in conversations with his accomplices was neither shown to have been promised nor demonstrated until the conversations

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[7] The majority opinion, written by Justice O'Connor, is joined in by Justices Brennan, Marshall, Stevens and Scalia. The dissenting opinion, written by Justice Kennedy, is joined in by Chief Justice Rehinquist and Justices White and Blackmun.

later took place. Thus, the acts of D'Annunzio in submitting to observation, monitoring and taping did not comprise a part of the circumstances surrounding the statements at the time they were made even though those acts served to make his statements highly trustworthy.

In any event, the untimeliness of the filing of the defendant's motion for a new trial leaves the court without jurisdiction to act upon the merits of the motion, for the reasons noted in Part II below.

II.

As earlier noted, on May 17, 1990, the jury returned verdicts of guilty against the defendant on six counts and the verdict form was filed with the clerk of the court. Thereafter, on June 28, 1990, the court entered the judgment of conviction order. The following day, June 29, 1990, defendant filed his post-verdict motions pursuant to Rules 29, 33 and 34 of the Federal Rules of Criminal Procedure. The government opposes the motions on the grounds, *inter alia*, that they are untimely because not filed within seven days of the verdict as required by the Rules of Criminal Procedure and, as a result, the court is without jurisdiction to grant the relief sought. The defendant has not responded to the government's claim of untimeliness and consequent lack of jurisdiction.

As an initial matter, the motions do not properly fit within the provisions of Rule 29, governing motions for judgment of acquittal, or Rule 34, governing motions in arrest of judgment. Moreover, to the extent that the government's objection relates to the timeliness of defendant's motions, the time for making motions under Rules 29 and 34 is essentially the same as that for Rule 33 motions for new trial. Accordingly, the timeliness of defendant's post-trial motions may be determined under Rule 33.

Rule 33 provides in pertinent part:

> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of

> justice. . . . A motion for new trial based on any [grounds other than the ground of newly discovered evidence] shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

The time for making a motion under Rule 33 may not be enlarged "except to the extent and under the conditions stated" in the rule. Fed. R. Crim. P. 45(b); *see also Mills* v. *United States*, 281 F.2d 736, 741 (4th Cir. 1960).

Additionally, insofar as Rule 33 requires a motion of the defendant, Rule 47 mandates that such "[a] motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally." Fed. R. Crim. P. 47. A review of the transcript of the defendant's trial shows that no oral motion for new trial was made after the return of the jury verdict. Neither is there any suggestion that the court permitted or received on oral motion at any subsequent time. Consequently, defendant's motion is not timely unless it was made in writing in accordance with the time constraints of Rule 33.

When the defendant's trial is by jury, the time period for making a motion under Rule 33 starts to run on the date the jury verdict is returned. *Rayor* v. *United States*, 323 F.2d 519, 520-21 (9th Cir. 1963), *cert. denied*, 375 U.S. 993 (1964); *United States* v. *DeRocco*, 320 F.2d 58, 59 (6th Cir. 1963); *see United States* v. *Mitchell*, 602 F.2d 636, 638 (4th Cir. 1979). Unless defendant's motion is filed within the seven-day period following return of the jury's verdict or such other time as may be set by the court within that seven-day period, the motion is untimely. *Mills*, 281 F.2d at 741. An extension of time made after the seven-day period has expired is itself untimely. *United States* v. *Hall*, 854 F.2d 1269, 1271-72 (11th Cir. 1988); *United States* v. *Hocking*, 841 F.2d 735, 736-37 (7th Cir. 1988). The time restrictions of Rule 33 being jurisdictional, the court is without author-

ity to consider an untimely motion for new trial, *United States* v. *Miller*, 869 F.2d 1418, 1420 (10th Cir. 1989); *Hocking*, 841 F.2d at 737, or to enlarge the time for making the motion after the seven-day period prescribed has expired, *Hall*, 854 F.2d at 1272.[8]

Inasmuch as the defendant did not file a written motion or seek an extension of time for filing such a motion during the seven-day period after the jury's return of its verdict on May 17, 1990, the post-verdict motions, filed on June 29, 1990, are untimely under Rule 33 and the court lacks jurisdiction to consider them.

Accordingly, it is ORDERED that defendant's post-verdict motions be, and the same hereby are, denied as untimely.

The Clerk is directed to forward copies of this order to the defendant and all counsel of record.

Dated: October 24, 1990

/s/ John T. Copenhaver, Jr.
JOHN T. COPENHAVER, JR.
United States District Judge

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[8] The decision in *Idaho* v. *Wright* was rendered June 27, 1990. The court entered judgment on the jury verdict of May 17, 1990, on June 28, 1990, in which the court purported to extend the time to file post-trial motions to July 9, 1990. The defendant filed his post-trial motions on June 29, 1990. The court lacked jurisdiction to extend the time in its order of June 28, 1990, for the reasons noted herein.

Supreme Court, U.S.
FILED
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No. 91-1663

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM T. ELLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the admission at petitioner's trial of statements made by a deceased accomplice of petitioner to law enforcement officers violated petitioner's rights under the Confrontation Clause.

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WILLIAM T. ELLIS, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 951 F.2d 580. The opinion of the district court denying petitioner's motion for a new trial (Pet. App. 11a-20a) is not reported.

JURISDICTION

The judgment of the court of appeals was filed on December 12, 1991. On March 3, 1992, the Chief Justice granted an extension of time until April 10, 1992, within which to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted of conspiracy to engage in extortion, in violation of 18 U.S.C. 1951; two counts of extortion, in violation of 18 U.S.C. 1951 and 1952; conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d); and obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to 90 months' imprisonment, to be followed by three years' supervised release. He was also fined $50,000. The court of appeals affirmed. Pet. App. 1a-10a.

1. Petitioner was a limited partner in Tri-State Greyhound Park, Inc., a West Virginia corporation that operates parimutuel betting on greyhound races. West Virginia law permitted Tri-State to keep a specified percentage—known as the "takeout"—of the revenue generated by public wagers. In 1987, a bill was introduced in the West Virginia legislature that would have increased the "takeout" percentage. Tri-State supported the bill and promised to pay petitioner $500,000 if it became law. Pet. App. 2a.

When the bill stalled in the West Virginia legislature, petitioner approached lobbyist Sam D'Annunzio and gave him approximately $20,000 in cash to obtain passage of the bill. D'Annunzio gave $10,000 of the money to State Senator Larry Tucker and offered cash and computer equipment to Senate President Dan Tonkovich. Gov't C.A. Br. 4-5. Eventually, the West Virginia legislature passed the bill and the Governor signed it into law. Pet. App. 2a.

Soon after the bill passed, federal authorities began an investigation of corruption surrounding the passage of the bill. As a result of that investigation, D'Annunzio entered into a plea agreement with the government. Pursuant to that agreement, D'Annunzio met several times with federal agents. During those meetings, at which D'Annunzio was represented by counsel, D'Annunzio explained the scheme to obtain passage of the bill and detailed his relationship with petitioner. D'Annunzio also recorded conversations with petitioner and other participants in the scheme. On December 4, 1988, in the midst of the investigation, D'Annunzio committed suicide. Pet. App. 3a.

2. At trial, IRS Special Agent Charles Little testified to the statements that D'Annunzio made in meetings with federal investigators. In particular, Agent Little testified to D'Annunzio's statements describing his dealings with Senators Tucker and Tonkovich. Pet. App. 12a. The district court admitted the statements under Federal Rule of Evidence 804(b)(5), the residual hearsay exception for unavailable declarants, after examining Agent Little's notes of the meetings with D'Annunzio. Pet. App. 12a-14a.

After his conviction, petitioner filed an untimely motion for a new trial, raising, among other claims, the contention that the Court's decision in *Idaho* v. *Wright*, 110 S. Ct. 3139 (1991), precluded admission of D'Annunzio's statements. Although the district court found that it lacked jurisdiction to consider the motion because it was untimely, the court nevertheless stated that D'Annunzio's willingness to engage in monitored conversations with the other participants in the scheme contributed to the reliability of his statements. Pet. App. 17a-18a.

3. The court of appeals affirmed. Pet. App. 1a-10a. The court applied a two-part test to determine whether

admission of D'Annunzio's statements violated the Confrontation Clause. That test required the government to prove (1) that the declarant was unavailable, and (2) that the statements "have the necessary 'indicia of reliability.' " Pet. App. 4a (quoting *Idaho* v. *Wright*, 110 S. Ct. at 3146). To satisfy the second part of the test, the court held, the government must show either that the statements fell within a firmly rooted hearsay exception or that "the statements bear sufficient guarantees of trustworthiness." Pet. App. 4a.

Applying that test, the court held that D'Annunzio's statements bore "strong 'indicia of reliability.' " Pet. App. 4a. Specifically, the court found the statements reliable for the following reasons:

> First, D'Annunzio issued the statements voluntarily in the presence of two government agents *and* both of his attorneys. Second, D'Annunzio made the statements in accordance with a plea agreement which required him to be truthful with federal investigators. Third, the government agents were taking notes in the presence of D'Annunzio as the statements were made. Fourth, D'Annunzio could be deemed to know, in view of the plea agreement, that what he was saying would be the subject of further investigation—and confirmation—by the government. Fifth, though the plea agreement did not require him to do so, D'Annunzio agreed to record subsequent conversations with the individuals he had implicated (Senators Tucker and [petitioner]), suggesting that he was willing to have the truthfulness of these statements tested.

Pet. App. 4a. The court also noted that petitioner had not questioned the accuracy of Agent Little's recollection of D'Annunzio's statements. Pet. App. 5a. The court

therefore held that the district court had properly admitted the statements. Pet. App. 6a.

ARGUMENT

Petitioner renews his contention (Pet. 8-26) that the district court's admission of a deceased declarant's hearsay statements at trial violated the Confrontation Clause. The Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against them." In *Idaho* v. *Wright*, 110 S. Ct. 3139 (1990), this Court reaffirmed that an out-of-court statement made by an unavailable declarant may be admitted into evidence without infringing the defendant's rights under the Confrontation Clause if the statement possesses adequate "indicia of reliability." *Id.* at 3147. See *Ohio* v. *Roberts*, 448 U.S. 56, 65-66 (1980). Reliability concerns are satisfied, without more, if the statement fits within a firmly rooted hearsay exception. *White* v. *Illinois*, 112 S. Ct. 736, 743 (1992); *Wright*, 110 S. Ct. at 3146-3147; *Roberts*, 448 U.S. at 66. If the statement does not fit within such an exception, it may nevertheless be admitted if the government shows that it carries "particularized guarantees of trustworthiness." *Wright*, 110 S. Ct. at 3147. That determination must be made by considering "the totality of the circumstances * * * that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.* at 3148. Evidence that corroborates the truth of the out-of-court statement may not be used to support its reliability for Confrontation Clause purposes. *Id.* at 3150. Instead, the statement must be shown to "possess indicia of reliability by virtue of its inherent trustworthiness." *Ibid.*

As the court of appeals explained, the circumstances surrounding the statements at issue in this case afford sufficient guarantees of their reliability. First,

D'Annunzio knew that federal investigators would seek to confirm or refute his statements by further investigation, and that a false statement could subject him to prosecution and imprisonment. In addition, D'Annunzio gave the statements in the presence of his counsel, who could be expected to act as a check on any tendency D'Annunzio might have had to lie. Finally, D'Annunzio agreed to record conversations with the other participants in the scheme. Because D'Annunzio knew that such recordings would increase the risk of revealing any false statements that he made to the agents, his willingness to wear a recording device is a further indication that his statements are reliable.[1] Taken together, these circumstances adequately support the district court's decision to admit the statements.

Petitioner contends (Pet. 16-20) that the court of appeals' reliance on the fact that D'Annunzio gave the statements pursuant to a plea agreement conflicts with the decisions of other courts of appeals. But none of the decisions on which petitioner relies holds that the existence of a plea agreement can never be used to support the reliability of a hearsay statement. See, *e.g.*, *United States* v. *Gomez-Lemos*, 939 F.2d 326, 333 (6th Cir. 1991) ("That Barraza and Osorio had entered into plea agreements with the Government * * * *does not necessarily*

[1] Petitioner contends (Pet. 15) that, because D'Annunzio did not agree to wear a recording device until after he made the statements at issue, the court of appeals' reliance on this factor involves the improper use of corroborative evidence to "bootstrap" the reliability of the statements, contrary to this Court's decision in *Wright*. *Wright*, however, forbids the government from showing the reliability of hearsay statements based on corroborative evidence that the events described in the statements actually occurred. It does not prohibit the use of an item of corroborative evidence that "render[s] the declarant particularly worthy of belief." See 110 S. Ct. at 3148.

lessen the likelihood that they would want to curry favor with the Government, avenge themselves, or spread the blame by implicating defendant.") (emphasis added); *United States* v. *Feldman*, 761 F.2d 380, 387-388 (7th Cir. 1985) (plea agreement creates "substantial likelihood that the statement is self-serving" and "*possible* unreliability") (emphasis added). The decision in *United States* v. *Bailey*, 581 F.2d 341 (3d Cir. 1978), on which petitioner also relies (Pet. 17-18), was expressly based on non-constitutional grounds. See 581 F.2d at 351. In this case, D'Annunzio knew that the truthfulness of his statements would be tested in the course of the government's investigation, and that any false statements could subject him to prosecution and imprisonment. Accordingly, the court of appeals reasonably concluded that, in the circumstances of this case, the existence of the plea agreement was a factor that increased the reliability of the statements. The fact that other courts have found statements made pursuant to other plea agreements less reliable does not create a conflict requiring resolution by this Court.[2]

Petitioner also contends (Pet. 20-23) that the court of appeals' decision conflicts with the statement in *Lee* v. *Illinois*, 476 U.S. 530, 541 (1986), that "the Confrontation Clause is uniquely threatened when an accomplice's

[2] Petitioner incorrectly suggests (Pet. 14) that the court's finding that D'Annunzio was aware that his statements would be subject to further investigation "would * * * apply to any statement made under a plea agreement." Obviously, the probability that a false statement will be uncovered by the government will vary with the circumstances of the case. In this case, the probability that a false statement would be detected was high. The government was pursuing an active investigation that included secret tape recordings of other participants in the scheme. At the very least, there was a reasonable probability that other participants would cooperate with the government.

confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." See also *Bruton* v. *United States*, 391 U.S. 123, 136 (1968) (accomplice's statement "inevitably suspect"). In *Lee*, however, the Court expressly recognized that the presumption of unreliability that attaches to such confessions may be rebutted by a showing that the statement bears sufficient indicia of reliability. 476 U.S. at 543. And in both *Lee* and *Bruton*, the statements at issue were given by the defendant's accomplice shortly after arrest, when the accomplice had the greatest incentive to cast blame on the defendant. In this case, in contrast, the statements were given in the presence of counsel and were attended by other guarantees of reliability.[3]

[3] Petitioner also contends (Pet. 24-26) that the federal agents' failure to preserve D'Annunzio's statements by means of tape recording or videotaping detracts from the reliability of the statements. That contention is inconsistent with petitioner's assertion (Pet. 14) that the fact that the agents made notes of the statements is "irrelevant" to the issue of reliability. In any event, the notes were relevant because they showed that Agent Little's testimony was consistent with his contemporaneous record of the statements. The fact that the statements were not recorded by other means did not preclude the use of the notes for that purpose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

WILLIAM T. ELLIS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

In the petition for certiorari, petitioner described the clear conflict which exists between the Fourth Circuit's holding that a statement made pursuant to a plea agreement supports finding a particularized guarantee of trustworthiness and the holdings of other federal circuits that the existence of a plea agreement is an indicator of *un*-trustworthiness. Pet. 16-20. The response submitted by the United States confirms the severity of this conflict. The government does not cite a single opinion, other than the one for which review is sought, that holds that a statement made pursuant to a plea agreement enhances trustworthiness. Instead, the United States attempts to downplay the severity of the conflict between the Fourth Circuit and other courts by focusing on trivial distinctions between the circuits' opinions. Opp. 6-7. The United States also repeats the trustworthiness factors listed by

the Fourth Circuit, but adds little to explain how those factors rendered declarant's statement particularly trustworthy, and makes virtually no effort to respond to petitioner's arguments that these factors were wholly inadequate to support admission of the statement.

This case presents a perfect vehicle in which to resolve the decisional conflict created in the wake of *Idaho* v. *Wright*, 110 S. Ct. 3139 (1990), because the district court itself acknowledged the critical nature of D'Annunzio's testimony. Without it, there was nothing to link the money petitioner appeared to pay for lobbying services to an illegal attempt to influence legislation. The United States does not challenge that finding; nor could it. Thus, the issue presented here is vital to the proper disposition of petitioner's conviction. The United States' three-and-a-half page effort to brush the issue aside warrants a reply.

1. The United States attempts to downplay the conflict between the Fourth Circuit and other courts by arguing that "none of the decisions on which petitioner relies holds that the existence of a plea agreement can *never* be used to support the reliability of a hearsay statement." Opp. 6 (emphasis added). But this response simply ignores the issue. Those courts have firmly held that the existence of a plea agreement gives a declarant a *motive* to fabricate the truth, and hence is an indicator of untrustworthiness. *United States* v. *Gomez-Lemos*, 939 F.2d 326, 333 (6th Cir. 1991); *United States* v. *Feldman*, 761 F.2d 380, 387-88 (7th Cir. 1985); *United States* v. *Bailey*, 581 F.2d 341, 350 (3d Cir. 1978); *United States* v. *Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977); *United States* v. *Turner*, 475 F. Supp. 194, 198 (E.D. Mich. 1978); see *United States* v. *Love*, 592 F.2d 1022, 1027 (8th Cir. 1979) (statement given to police while declarant believed she was subject to prosecution inadmissible under Rule 804(b)(5) and "raises a serious confrontation clause issue"). In stark contrast, the court

of appeals here relied almost exclusively on the plea agreement to support trustworthiness.[1]

2. The government argues that the decision is correct because here the declarant, D'Annunzio, "knew that the truthfulness of his statements would be tested in the course of the government's investigation, and that any false statements could subject him to prosecution and imprisonment." Opp. 7. First, this does not eliminate the conflict in the circuits. In cases relied upon by petitioner, the declarants also had grounds to believe that their statements would be subject to further testing and investigation. See, e.g., *Gomez-Lemos*, 939 F.2d at 328 (declarant testified before grand jury pursuant to plea agreement but refused to testify at trial); *Bailey*, 581 F.2d at 343 ("terms of the agreement required [declarant] . . . to testify at any future proceedings concerning the robbery"); *Turner*, 475 F. Supp. at 198 (declarant gave signed statement as part of ongoing drug investigation and agreed "to testify before the Grand Jury"). Moreover, the awareness that their statements would be subject to further investigation would apply to virtually all declarants giving statements pursuant to plea agree-

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[1] The government's charge that *United States* v. *Bailey* is distinguishable because it was ultimately decided on non-constitutional grounds, Opp. 7, raises another distinction without a difference. In *Bailey* the court avoided deciding the case on constitutional grounds by holding that statements made pursuant to a plea agreement did not possess "guarantees of trustworthiness equivalent to the other Rule 804(b) exceptions that serve as a benchmark for Rule 804(b)(5)" and hence were improperly admitted under the catch-all provisions of Rule 804(b)(5). 581 F.2d at 350. Bailey's holding that a statement made pursuant to a plea agreement lacked "guarantees of trustworthiness equivalent to other Rule 804(b) exceptions" is directly relevant to the core issue presented by the Fourth Circuit's analysis.

Moreover, the government's argument misses the primary point that declarant's statement was not admissible and, if it had been offered in other courts, would not have been admitted. Obviously, this Court still could choose not to reach the constitutional issue, and could decide the case based on the federal rule.

ments. See Pet. 14; Opp. 7 n.2. The purpose of government investigators in taking a co-conspirator's statement under a plea agreement usually is to further an investigation.

Furthermore, the United States notes that "[t]he government was pursuing an active investigation that included secret tape recordings of other participants in the scheme," Opp. 7 n.2, and then adds "[a]t the very least, there was a reasonable probability that other participants would cooperate with the government." *Id.* But nothing is cited to show that D'Annunzio was aware of the nature of the government's investigation when he gave his statements in January 1988.

Moreover, the government's contention that fear of detection will outweigh any motivation to shade the truth that a declarant giving statements under a plea agreement may have should not be the basis of holding that such statements possess the "particularized guarantees of trustworthiness" required by the Confrontation Clause. This Court has emphasized that the totality of the circumstances should indicate that a declarant lacks motivation to lie:

> We think the "particularized guarantees of trustworthiness" required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief.

Idaho, 110 S. Ct. at 3149. The fact that a declarant may have some understanding that portions of his statement given under a plea agreement may be investigated "provide[s] no basis for supposing that the declarant is particularly likely to be telling the truth." *Id.* at 3150. Only cross-examination, especially about a subject that was known only by the declarant and petitioner, can adequately serve to test the trustworthiness of that kind of statement. See *Lee* v. *Illinois*, 476 U.S. 530, 541

(1986) ("the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination"); *Bruton* v. *United States*, 391 U.S. 123, 136 (1968) (accusations of co-conspirator are "inevitably suspect"); *Douglas* v. *Alabama*, 380 U.S. 415, 420 (1965) (cross-examination of government agent "could not substitute for cross-examination of [defendant's accomplice] to test the truth of the statement itself").[2]

The remainder of the government's response consists of relisting the trustworthiness factors relied upon by the Fourth Circuit. As indicated in the petition, these factors largely reduce to the single fact that D'Annunzio's statement was given pursuant to a plea agreement. No effort is made by the government to respond to any of petitioner's specific arguments concerning these "factors".[3] The reason for that silence is patent; the govern-

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[2] The problem of "selective reliability" and verification are particularly acute in this case. The declarant allegedly told investigating agents that petitioner approached him and said "Can you go to someone? I've got as high as $20,000 to get the bill moving." No other evidence produced at trial indicated that petitioner made this statement or understood that D'Annunzio would bribe officials. As the alleged conversation occurred only between D'Annunzio and petitioner, D'Annunzio's statement could not be verified or disproved. Hence, D'Annunzio might have had little fear of detection in making his statement.

[3] The government does state, in a footnote, that D'Annunzio's subsequent decision to wear a wire does not constitute "corroborative evidence that the events described in [D'Annunzio's] statements actually occurred." Opp. 6 n.1. The fallacy of the government's position is that D'Annunzio's decision to wear a wire, standing alone, proves little about his earlier trustworthiness in making his statements. The worth of D'Annunzio's subsequent action depends upon whether D'Annunzio actually met with the petitioner and discussed petitioner's alleged intention that D'Annunzio bribe legislators. The government is arguing, contrary to *Idaho* v. *Wright*, that subsequent taped conversations may be used as corroborative evidence to "bootstrap" the trustworthiness of prior statements. In the present case, such use of D'Annunzio's two, brief taped conversations with

ment cannot defend this inherently unreliable but absolutely vital evidence.

3. The government's attempt to paper over the conflict between the course taken by the Fourth Circuit and that of other Circuits with respect to the trustworthiness of statements given pursuant to a plea agreement should be rejected, and the Fourth Circuit brought in line with other circuits. The spectre of petitioner serving more than seven years in prison based solely on a hearsay statement made during plea negotiations by an individual who committed suicide while the government's investigation was ongoing simply cannot satisfy the requirement of trustworthiness. Because the court of appeals' assessment of that issue departs fundamentally from the conventional wisdom followed by most other courts, review by this Court is warranted.

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petitioner is particularly egregious, for in neither of the conversations did D'Annunzio state to petitioner that petitioner had given money to D'Annunzio to be used to bribe legislators. Moreover, the taped conversations themselves were admitted and their evidentiary value weighed directly by the jury.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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